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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 DeWITT CONSTRUCTION, INC.,

11 Plaintiff,

12 v.

13 CHARTER OAK FIRE INSURANCE;
14 TRAVELERS PROPERTY & CASUALTY
CO.; THE TRAVELERS INDEMNITY
COMPANY OF AMERICA; and THE
TRAVELERS INDEMNITY COMPANY OF
ILLINOIS,

17 Defendants.

Case No. C00-1150FDB

ORDER DENYING DeWITT'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT RE ESTOPPEL AND
GRANTING TRAVELERS' CROSS-
MOTION FOR SUMMARY
JUDGMENT ON ESTOPPEL CLAIM

18 This cause of action arises from a large-scale commercial construction project in Issaquah,
19 Washington for which DeWitt Construction, Inc. was a subcontractor. DeWitt subcontracted with
20 Opus Northwest LLC (Opus) the general contractor, to drill and place concrete piles into the ground
21 to serve as a primary component of a building's foundation. In the contract DeWitt promised to
22 achieve a minimum strength in the concrete piles, but the piles did not harden properly and did not
23 achieve the required strength. DeWitt had to install thirty more piles, which resulted in delays to the
24 overall project, re-engineering the site's foundation, and removal and reinstallation of other
25 subcontractors' work, and DeWitt damages buried mechanical and site work completed by other

26 ORDER - 1

1 subcontractors. Opus asserted a \$3.5 million claim against DeWitt, DeWitt tendered the claim to its
 2 insurance company, Travelers, but Travelers informed DeWitt that it was denying both defense and
 3 indemnification benefits under the policies. Judge Rothstein rendered a decision, which was
 4 appealed.

5 The issues on appeal were whether the district court erred (1) in finding that there was no
 6 coverage, (2) in finding that Travelers breached its duty to defend DeWitt, (3) in calculating the
 7 damages awarded to DeWitt, and (4) in dismissing DeWitt's bad faith and Consumer Protection Act
 8 claims. The Ninth Circuit affirmed in part and reversed in part, as follows:

9 ... Specifically, and as explained above, we affirm denial of coverage on the
 10 alleged damage to site from defective piles; we reverse denial of coverage on the
 11 subcontractors' work that was destroyed because of the defective piles (and direct the
 12 district court to enter a partial summary judgment to DeWitt on this issue); and we
 13 remand for further proceedings and factual determinations pertinent to application of
 14 the course of operations and of the care, custody, and control exclusions, as they may
 15 relate to the damage to buried subcontractors' work caused by DeWitt's movement
 16 of equipment to install new piles. We affirm the grant of summary judgment to the
 insured and against the insurer for breach of the duty to defend. On that issue, we
 remand for a recalculation of attorneys fees and costs subsequent to the arbitration
 demand, and for consideration whether there are other recoverable damages for
 breach of the duty to defend as to any portion of the settlement between DeWitt and
 Opus that reflects covered property damage. We finally affirm the grant of summary
 judgment to the insurer rejecting the bad faith and CPA claims because the insurer's
 position was not unreasonable, frivolous or unfounded. ...

17 *DeWitt Construction, Inc. v. Charter Oak Fire Ins. Co.*, 307 F.3d 1138, 1139 (9th Cir. 2002).

18 DeWitt now moves for partial summary judgment estopping Travelers from attempting to
 19 allocate the dollar amount of the Opus/DeWitt written settlement agreement entered into in August
 20 2000.

21 DeWitt seeks to prevent Travelers from allocating settlement amounts between elements that
 22 are "covered" and "uncovered" under its policy. DeWitt argues that it has met the third of three
 23 elements, that is, that DeWitt acted to its detriment or prejudice as a result of the wrongful acts of
 24 the insurer. DeWitt argues that while the Ninth Circuit did not find bad faith in Travelers' actions,
 25 DeWitt nevertheless contends that it may affirmatively establish facts that demonstrate that it was

26 ORDER - 2

1 harmed or prejudiced by the acts or omissions of the insurer. DeWitt then goes on to cite *Hanson*
 2 *Co., Inc v. Aetna Casualty & Surety Co.*, 15 Wn. App. 608, 550 P.2d 701 (1976) wherein the Court
 3 listed some possible ways to show prejudice, among them, loss of a favorable settlement of the case,
 4 or inability to produce all testimony existing in support of the defense. DeWitt contends that Opus
 5 stood ready, willing, and able to compromise the amount of its actual losses and that DeWitt was
 6 deprived of the ability to retain all of its own “required” experts in its defense due to its modest
 7 financial capabilities.

8 In response, Travelers argues that DeWitt has failed to demonstrate the elements of estoppel.
 9 The three elements of estoppel, as applied in this case, are as follows:

- 10 1. An admission, statement, or act by Travelers inconsistent with a claim afterwards
 11 asserted;
- 12 2. Action by DeWitt in reliance on that statement;
- 13 3. Injury to DeWitt from allowing Travelers to contradict or repudiate the statement.

14 First, Travelers argues that DeWitt shows no inconsistent statement. Travelers consistently
 15 maintained that there was no coverage for the Opus claim against DeWitt. Additionally, as to
 16 participation in mediation, Travelers stated that it was evaluating coverage and would attend the
 17 mediation if coverage existed. Second, Travelers argues that DeWitt showed no detrimental reliance
 18 on an inconsistent statement. Third, Travelers argues that DeWitt has shown no injury from reliance
 19 on an inconsistent statement by Travelers. In the cases cited by DeWitt, there was an implied
 20 statement that the claim against the insured was covered, or that there was reliance on the insurer’s
 21 acceptance of defense, or that there was injury or prejudice from detrimental reliance. Travelers
 22 argues that none of the fact patterns in DeWitt’s cases stand for the proposition that one can prove
 23 estoppel merely by showing injury or prejudice.

24 Travelers argues that while DeWitt complains that Travelers wants to go behind the
 25 Opus/DeWitt settlement to segregate covered from non-covered damages, nevertheless, this is
 26 ORDER - 3

1 exactly what the Ninth Circuit directed. The Ninth Circuit said in rejecting DeWitt's argument that
 2 Travelers was liable for the full amount of the Opus/DeWitt settlement and held that absent bad faith,
 3 DeWitt's settlement did not bring otherwise non-covered items in coverage. Since there was no bad
 4 faith, the Ninth Circuit reasoned, travelers is liable for the reasonable amount of the settlement that
 5 was paid for covered items, and directed this court to determine the proper amount on remand.
 6 Specifically, the Court stated:

7 Because we have determined that the policies do cover property damage to the
 8 subcontractor's work on the defective piles, and because the fact-finder may conclude
 9 that the buried mechanical and site work is also covered by the policy, on remand the
 10 district court should consider (1) the portion of a reasonable settlement, if any, that
 11 can fairly be said to be related to the covered property damage; and (2) whether any
 12 such portion is recoverable as damages for breach of duty to defend.

13 *DeWitt Construction, Inc. v. Charter Oak Fire Ins. Co.*, 307 F.3d 1127, 1137 (9th Cir. 2002). The
 14 Court further stated in footnote 8 (added after denial of rehearing and rehearing en banc):

15 We reject DeWitt's argument that Washington law permits no allocation of settlement
 16 if the insurer breached the duty to defend. ... Absent bad faith, the insurer is "liable for
 17 the judgment entered provided that the act creating liability is a covered event and
 18 provided the amount of the judgment is within the limits of the policy." ... Because
 19 there was no bad faith here, see *infra* Section III, allocation is appropriate. To
 20 conclude otherwise would be to afford the same remedy in cases where the insurer
 21 has breached the duty to defend in good faith as in cases where such breach was in
 22 bad faith.

23 *Id.* 307 F.3d at 1138 n.8.

24 DeWitt argues that under *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 561, 951 P.2d 1124
 25 (1998), when an insurer breaches a contract in good faith, the insured must be put in as good a
 26 position as he or she would have been had the contract not been breached. In the failure-to-defend
 context that means that the insured is entitled to recover (1) the cost of defending the underlying
 action and (2) the amount of the judgment entered against the insured provided the act creating
 liability is a covered event. DeWitt is not entitled to be put in a better position than it would have
 been had the insurer not breached the contract.

27 Travelers states that it has already paid DeWitt its costs of defense for the underlying case as
 28 ORDER - 4

1 well as all attorneys' fees and costs awarded under the Ninth Circuit's opinion. The only issue
2 remaining for trial (or possible motion) is the amount of the covered loss as defined by the Ninth
3 Circuit's mandate.

4 DeWitt's estoppel arguments are not convincing. This Court will follow the mandate of the
5 Ninth Circuit and make the determination that it directed.

6 ACCORDINGLY,

7 IT IS ORDERED:

- 8 1. Plaintiff DeWitt Construction's Motion for Partial Summary Judgment Regarding
9 Estoppel of Travelers To Contest Allocation of Settlement Amount (Doc. # 122) is DENIED;
- 10 2. Defendant Travelers' Cross-Motion For Summary Judgment on Estoppel Claim (Doc. #
11 138 (Response & Cross-Motion)) is GRANTED, and
- 12 3. Plaintiff DeWitt's estoppel claim is DISMISSED with prejudice.

13 DATED this 15th day of March, 2004.

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S/ Franklin D. Burgess

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FRANKLIN D. BURGESS

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UNITED STATES DISTRICT JUDGE

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